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No. 188

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

v.

AMERICAN FOREIGN STEAMSHIP CORP., ET AL.

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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No. 138

UNITED STATES OF AMERICA, PETITIONER

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AMERICAN-FOREIGN STEAMSHIP CORP., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

I

The problem of participation by circuit judges in actions taken by a court of appeals after their retirement can arise in various factual situations which bring into play different statutory provisions. Respondents have indiscriminately lumped these various situations together, and have thus obscured the consideration which is decisive here; that the action in which the retired judge participated was by the court of appeals *en banc*, not a three-judge division or panel, and that the action was not the grant or denial of a petition for rehearing *en banc* but a decision on the merits by the court *en banc*.

1. *Participation by a retired circuit judge in decision by a three-judge panel, of which he was a member, of a case heard before his retirement.* This is the situation presented by *Goldfine v. United States*, 268 F. 2d 941 (C.A. 1), pending on petition for certiorari, No. 396, this Term, and the other recent cases in the First and Second Circuits (involving Judges Magruder and Medina) cited in the brief for respondent American-Foreign Steamship Corp., pp. 51-54.

Here, of course, the last sentence of 28 U.S.C. 46(c), providing that "A court in banc shall consist of all active circuit judges of the circuit," is in terms wholly inapplicable. The relevant statutory provisions are, rather, 28 U.S.C. 43, 294, and 296 (quoted in the Appendix to the Government's main brief, pp. 30-33). Under these provisions there is no question of the power and right of a retired circuit judge to participate in the decision of a case heard before his retirement by a three-judge panel of which he was a member. The only possible problem is whether a *formal* written designation and assignment by the chief judge is required. In cases heard before retirement, the validity of the circuit judge's designation inheres in the fact that he was properly assigned to the case as an active judge and that his continued participation is with the knowledge and at least tacit acquiescence of the chief judge. In such circumstances, it would be insisting upon an idle and unnecessary formality for the chief judge to be required to state in writing what is patently the fact, namely, that the retired judge has

been authorized to see the case through to its conclusion notwithstanding his retirement. (See the cases in ten circuits cited in the brief for respondent American-Foreign Steamship Corp., p. 50.)

The controlling consideration, we repeat, is that Section 46(c), dealing with *en banc* proceedings, imposes no barrier whatsoever to a retired judge's participation in decisions by a three-judge panel.

2. *Participation by a retired, or assigned, judge in determining whether or not a petition for rehearing en banc should be granted.* The problem in this situation is suggested by *Commercial Nat. Bank in Shreveport v. Connolly*, 177 F. 2d 514 (C.A. 5); *United States v. Sentinel Fire Ins. Co.*, 178 F. 2d 217 (C.A. 5); *G. H. Miller & Co. v. United States*, 260 F. 2d 286 (C.A. 7); *United States v. Gordon*, 253 F. 2d 177 (C.A. 7); and cf. *Bishop v. Bishop*, 257 F. 2d 495 (C.A. 3). (The facts of these cases are described in our main brief, p. 19, note 17, and p. 23, note 23.)

Here, again, the last sentence of 28 U.S.C. 46(c), quoted *supra*, p. 2,—which we think governs the different situation presented by the instant case—is in terms wholly inapplicable. The controlling provision is, rather, the first sentence of Section 46(c), providing that “Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service.”

This Court has held that the statute does not compel the courts of appeals to adopt any particular procedure governing the exercise of the power to hear or rehear cases *en banc*, and that it may entrust the

initiation of rehearings *en banc* to the three-judge division which originally heard and decided the case. *Western Pacific Railroad Case*, 345 U.S. 247, 267-268. Accordingly, there would appear to be no reason why a retired or assigned judge who has sat in the case may not take part in the consideration of a petition for rehearing *en banc* if the court of appeals chooses to allow such a procedure. But it does not follow that a retired or assigned judge may effectively vote to grant a rehearing *en banc*. Under Section 43(c), a rehearing *en banc* may be ordered only "by a majority of the circuit judges of the circuit who are in active service." We are aware of no case in which rehearing *en banc* was granted on the basis of a vote by any judge who was not a circuit judge of the circuit in active service. In the instant case, for example, the order of December 19, 1957 (R. 114), granting rehearing *en banc* recited that "The division of the court which heard and decided these appeals having referred the pending petitions for rehearing to the whole court¹ and the court having voted to grant the petitions for *en banc* procedure, * * *." Presumably, neither Judge Leibell, the retired district judge who sat by designation as a member of the three-judge division, nor retired circuit Judges Hand, Swan and Chase joined in this order.

¹ The reference to "the whole court" is clearly to the circuit judges of the circuit in active service. See *Reardon v. California Tanker Co.*, 260 F. 2d 369, 375 (C.A. 2); *United States v. Silverman*, 248 F. 2d 671, 696 (C.A. 2). Accord: *United States v. United Steelworkers of America*, 271 F. 2d 676, 694 (C.A. 3) (retired Judge Maris did not vote on whether rehearing *en banc* should be ordered; the judges in active service being equally divided, there was no rehearing). See also the Fifth and Seventh Circuit cases cited *supra*, p. 3.

3. *Participation by a retired judge in the decision by the court en banc of a case heard prior to his retirement.* This problem is presented by the instant case. While the situation has doubtless arisen elsewhere,² it appears to have been expressly noticed in only two other cases, both in the Ninth Circuit (*In re Sawyer*, 260 F. 2d 189, 203, note 17, reversed on other grounds, 360 U.S. 622; *Herzog v. United States*, 235 F. 2d 664, 670, note (discussed in our main brief, p. 23, note 23)), where conflicting results were reached.

• In this situation, 28 U.S.C. 46(c) would appear to be unequivocal and decisive. Our argument is elaborated in the main brief and will not be repeated here.

4. *Participation by a retired circuit judge in an en banc proceeding where his retirement preceded the hearing as well as the decision.*

In this situation it is entirely clear that 28 U.S.C. 46(c) precludes participation by a retired judge, even if he sat, as an active judge or by assignment, on the panel which heard the case originally. For example, in *Reardon v. California Tanker Co.*, 260 F. 2d 369, 375, 376 (C.A. 2), Judge Medina, who had taken part in the original three-judge panel decision, retired before the rehearing *en banc* was ordered. He withdrew from the *en banc* proceeding. This has been the uniform practice in the Second Circuit (see cases cited in the separate statement of Chief Judge Clark

² Semble: *Corabi v. Auto Racing, Inc.*, 264 F. 2d 784 (C.A. 3); *Jamison v. Kammerer*, 264 F. 2d 789 (C.A. 3); *United States v. Price*, 263 F. 2d 382 (C.A. 9).

and Judge Waterman, R. 140) and other circuits.^{*} Since the inability to sit on the *en banc* court arises out of the status of being a retired, rather than active, judge, it cannot be cured by a designation and assignment.

However, if respondents are correct in their contention that the literal terms of Section 46(c) must yield to the principle that "a properly qualified judge who hears a case has not only the right but the duty to complete it" (Br. 15), it would follow that any judge who properly sits with a three-judge division should also be a member of the *en banc* court. This would be true regardless whether he retires before or after rehearing *en banc* is ordered; regardless whether he is a circuit judge of the circuit or a circuit justice, circuit judge of another circuit, district judge, or other federal judge (*e.g.*, of the Customs Court) sitting by designation; and regardless whether he was active or retired when he took part in the three-judge division hearing. On this theory, Judge Leibell (the retired district judge sitting by designation) should not have withdrawn from the instant *en banc* proceedings. Presumably, if the division had consisted (as it properly could have) of Judge Leibell, a retired circuit judge, and a judge assigned from

^{*} *G. H. Miller & Co. v. United States*, 260 F. 2d 286, 291-293 (C.A. 7); *United States v. Gordon*, 253 F. 2d 177, 191-192 (C.A. 7); *Aaron v. Cooper*, 257 F. 2d 33 (C.A. 8); *Leary v. United States*, 268 F. 2d 623 (C.A. 9); *Fisher Flouring Mills Co. v. United States*, 270 F. 2d 27 (C.A. 9); *Pacific Gamble Robinson Co. v. United States*, 270 F. 2d 35 (C.A. 9); *Albers Milling Co. v. United States*, 270 F. 2d 36 (C.A. 9); *Pryor v. Moore*, 262 F. 2d 673 (C.A. 10); *Stewart v. United States*, 267 F. 2d 378 (C.A. 10); *Petersen v. United States*, 268 F. 2d 87 (C.A. 10).

another circuit or district,* all three of them would (on respondents' theory) not only be entitled, but actually required, to sit as members of the court of appeals *en banc*. This would reduce the purpose of *en banc* proceedings to an absurdity, and would be clearly contrary to Section 46(c), which says that "A court in banc shall consist of all active circuit judges of the circuit" *without* adding, as Section 43(b) does, a further sentence that "The circuit justice and justices or judges designed or assigned shall also be competent to sit as judges of the court [in banc]."†

II

Unless the express language of Section 46(c) is to be ignored, the *en banc* court here was improperly constituted because of Judge Medina's participation in the decision, his vote being decisive, and hence the judgment below was invalid and should be vacated. Respondents argue, however, that the statute should not be read to mean what it says because to do so would attribute to Congress a "capricious" and "illogical" intent to interfere with the orderly administration of the courts. While we doubt the relevance of this line of argument here, several brief comments may be made.

* In *Herzog v. United States*, 235 F. 2d 664, 670, n. (C.A. 9), the three-judge division, which originally heard the case consisted of Judge Chambers (an active circuit judge), Judge Mathews (a retired circuit judge sitting by designation), and Judge Byrne (an active district judge sitting by designation). When the case was ordered to be heard *en banc*, Judges Mathews and Byrne withdrew.

† As appears *infra*, p. 9, the amendment of Section 46(c) proposed by the Judicial Conference would allow only retired circuit judges of the circuit, who have sat in the original hearing, to participate in an *en banc* rehearing.

1. To the extent that Section 46(c), in its present form, may be deemed to present obstacles to the expeditious dispatch of judicial business, the way to deal with it is through new legislation. Thus, at its regular annual meeting in September 1959, the Judicial Conference of the United States took note of this and related problems. Its Report (H. Doc. No. 321, 86th Cong., 2d Sess., pp. 9-10) stated:

(5) *The status of retired circuit and district judges.*—The Committees [on Court Administration and Revision of the Laws] reported that various questions had arisen as to the status of retired circuit and district judges with respect to their participation in certain activities of their former courts when they are assigned to active duty therein. These include the participation of retired circuit and district judges in the appointment of officers of the court and in the promulgation of court rules, and, in the case of retired circuit judges, membership on the judicial council of the circuit and of the court of appeals sitting in banc. *It was the view of the Committees that under the statute only judges who are in "regular active service", that is, those who have not retired under Section 371(b) or 372(a), Title 28, United States Code, are the judges in "active service" to which the statutes refer.* However, the Committees thought it proper to permit a retired circuit judge to be a member of the court of appeals sitting in banc in the rehearing of a case in which he has sat, by assignment, in the panel of the court which heard the case originally. *The Conference agreed and thereupon approved the following draft of a bill, presented by the Committees, clarifying the*

statute and incorporating the change suggested,
[Emphasis added.]

The draft bill approved by the Judicial Conference (subsequently introduced by Representative Celler on April 5, 1960, as H.R. 11567, 86th Cong., 2d Sess.) would amend Section 46(c) by adding the following sentence:

A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.

2. Respondents assert that Section 46(c), if read literally, would create delays and have other undesirable results in the disposition of cases heard *en banc* because (1) a judge familiar with the case would have to withdraw upon his retirement; and (2) the *en banc* court would have to be reconstituted whenever a new circuit judge, not familiar with the case, is appointed.

We suggest that these difficulties have been overdrawn. As to the first, the retired judge might be able to accommodate himself to the needs of the situation by making his retirement effective on such date as he has completed all his unfinished judicial duties.*

*In this case rehearing *en banc* was granted, in an order signed by Judge Medina, on December 19, 1957 (R. 114). Argument was confined to the briefs, which were filed January 8 and 20, 1958.

On January 28, 1958, Judge Medina (who became eligible for retirement on his 70th birthday, February 16, 1958) publicly stated he was considering retirement "in a few months." (N.Y. Times, Jan. 29, 1958, p. 17, col. 8.) In a statement from the bench on February 7, 1958, he announced his retirement

Hearings *en banc* are the exception, not the rule;⁷ and ordinarily there is no serious problem since (as noted *supra*, pp. 2-3) in cases decided by a three-judge panel, retirement does not prevent a judge who has sat in the case from participating in the decision (see, esp., 28 U.S.C. 296, quoted in our main brief, p. 32).

Nor, as to newly appointed judges, is there any serious problem of "reconstituting" the court. The new circuit judges are, of course, members of the court of appeals *en banc* just as newly appointed Justices are members of this Court. But newly appointed Justices customarily refrain from participating in the decision of cases heard by the Court before their appointment and with which they are not familiar. The same rule of judicial practice would allow a new circuit judge not to participate in the decision of cases heard and taken under advisement by the court *en banc* prior to his appointment.* Or

from active service, effective March 1, 1958. (N.Y. Times, Feb. 8, 1958, p. 5, col. 5.)

The decision *en banc* was announced on July 28, 1958 (R. 218).

⁷ Cf. the divergent points of view expressed by Judges Danaher and Fahy in *Cafeteria and Restaurant Workers Union v. McElroy* (C.A. D.C.), decided April 14, 1960.

* As examples: In *Yanow v. Weyerhaeuser Steamship Co.*, 274 F. 2d 274 (C.A. 9), which was argued *en banc* on June 29, 1959; Judge Koelsch was appointed and took the oath on September 25, 1959, and Judge Merrill on October 8, 1959; the case was decided by the *en banc* court on November 12, 1959, Judges Koelsch and Merrill not participating. In *In re Sawyer*, 260 F. 2d 189, 203, n. 17 (C.A. 9), Judge Denman retired after hearing argument as a member of the *en banc* court and his successor, Judge Hamlin, took the oath on April 16, 1958, before the *en banc* decision was announced on June 9, 1958; neither Judge Denman nor Judge Hamlin participated in the *en banc* decision.

the court of appeals, as this Court has sometimes done, could decide that the case should be reheard before the entire court, including the new member.² At all events, the matter would rest within the control and responsible discretion of the court of appeals and its judges.¹⁰

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² For example, *King v. Waterman Steamship Corp.*, 272 F. 2d 323 (C.A. 3), was first reargued *en banc* on December 1, 1958. Judge Maris, who sat as a member of the *en banc* court, retired on December 31, 1958, and was replaced by Judge Forman, who took the oath on September 24, 1959. The case was set down for second reargument *en banc* on October 5, 1959, with Judge Forman sitting and Judge Maris withdrawing from further participation in the case. On November 17, 1959, the case was decided by a 4 to 3 vote, Judge Forman's vote being decisive.

¹⁰ While respondents do not argue the limitations issue, their briefs present their version of the facts underlying that issue as if the "facts" set forth were undisputed or had been decided in their favor by the *en banc* majority below. Such is not the case, however. The court below merely acknowledged respondents' version of facts (which the Government regards as inaccurate) as "claims" and remanded for the very purpose of ascertainment of the facts and determination of limitations in the light of any evidence the parties might introduce. (R. 120-122, 123-125, 126.)